FRASER (Sir William) K.C.B.

Memorial as to the
Ruthven Peerage

(1870)

National Library of Scotland
B000028035

Digitized by the Internet Archive
in 2012 with funding from
National Library of Scotland

http://www.archive.org/details/memorialastoruth00fras

PRIVATE.

MEMORIAL

AS TO

THE RUTHVEN PEERAGE.

MUNSON CASTLE
BEQUEST FUND

LIBRARY OF THE
ROYAL COLLEGE OF SURGEONS
EDINBURGH
1957

MEMORIAL

AS TO

THE RUTHVEN PEERAGE.

Sir Thomas Ruthven of Freeland, Knight, was by King Charles II created Lord Ruthven of Freeland, between the 28th of March, 1651, and the 1st of January, 1661. On the first of these dates he is entered in the Records of Parliament as the *Laird of Freeland,* and on the second date he sat in Parliament as *Lord Ruthven.* The original Patent of Creation is lost, and from searches which have been made from time to time, and particularly when the succession opened to the late Lord Ruthven, in all the records where Patents of Peerages are usually entered, no registration of this Patent has been discovered. The Patent being lost, and the limitations of the dignity being unknown, recourse must be had to those *presumptions of law* which have been established for supplying the loss of Patents, and for ascertaining the limitations on the most probable grounds.

The general rule of law, which has been established by the House of Lords in those cases where the Patents of Creation have been lost, is, that the Dignities were limited to the heirs male of the body of the persons first ennobled, unless the descent of the Dignity, through females, raise the contrary presumption. The general presumption of law in favour of heirs male, is therefore, capable of being redargued by the facts and circumstances arising in each particular case.

As the right to the Ruthven Peerage, in favour of the present Lady Ruthven, depends upon establishing a successful exception to the general presumption in favour of heirs male, it is necessary that the whole facts connected with the Descent through females should be thoroughly sifted, and impartially stated, to enable a satisfactory conclusion to be drawn.

The present statement will be divided into the following heads, which embrace all the leading points in the Case :—

I. The circumstances in which the Creation took place, and of the family of the Grantee.

II. The limitations of contemporary Patents of Peerages.

III. The limitations of the territorial Estates belonging to the Grantee.

IV. The descent of the Title to heirs male and female, according as the succession opened to them, for nearly two centuries.

V. Presumptions of law in favour of heirs female.

I. The circumstances in which the Creation took place, and of the family of the Grantee.

Sir Thomas Ruthven was a man of distinguished ability, he possessed much power and influence in the Civil Wars in the time of Charles I,* and he took part with the Parliament both before and after the King's death. When Charles II was in Scotland he created several Peers about the time of his Coronation, which took place in January, 1651. Among these creations was that of Lord Ruthven. This Dignity was conferred by Charles, not to reward a political supporter, but rather to gain the assistance of one who had previously lent his services to those who were then opposing the King.

Sir Thomas Ruthven had an only son, and three daughters. The son and the youngest daughter both died unmarried. The other two daughters married. The elder had an only son, and the other an only daughter.

In this state of the family the probability was that the Dignity, if limited to males, would have become extinct on the death of the son of the Grantee.

The Dignity of Lord Ruthven had previously existed in the Grantee's family, which represented the old Earls of Gowrie ; and when the King resolved to revive the Ruthven Barony in the person of Sir Thomas Ruthven, in 1651, he had probably in view the two-fold object of securing the services and influence of the Grantee, and of perpetuating an ancient title in a family which had previously possessed it, along with higher honours. This could best be done, in the state of the family at the time, by extending the limitations of the Patent, so as to include heirs general as well as heirs male.

II. Limitations of contemporary Patents of Peerages.

As already shown, Lord Ruthven was Created between the years 1651 and 1661, and, in the absence of the Patent, it seems important to ascertain the limitations of other Peerages which were then created.

Between the 4th of January, 1651, and the 1st of January, 1661, there are on record the Patents of eleven new creations, and the following are the limitations :—

Three are to the Grantees and the heirs male of their bodies.

Other three are to the Grantees and their heirs male general.

One is in favour of the Grantee, "ejusque heredibus masculis talliæ et "provisionis in ejus infeofamentis *expressis seu exprimendis.*"

Another is to the Grantee for his life only.

Another is to the Grantee and *his heirs* bearing his name and arms.

Another is to the Grantee and *his heirs whatsoever.*

And the last is to the Grantee, and the heirs male of his body, whom failing, to any person to be *nominated* and *designated* by him, at any time of his life, to succeed him in the Dignity.

Although, as at other times, the limitations in favour of heirs male, both lineal and collateral, are more numerous in the Patents here referred to than the limitations in favour of heirs general, it will be observed that there are several Patents in favour of heirs female, and that there is, indeed, every

* Lord Ruthven's talents were not confined to Civil and Military affairs. He was known as a "learned Chymist," and published a work called *The Ladies' Cabinet,* which treats of many "rare secrets and rich ornaments of several kinds and different uses, comprising Physic and "Chirurgery," &ca. The fourth Edition of this work was published at London in 1667, four years before his Lordship's death.

variety of limitation, from the mere liferent of the Grantee himself to the delegation of the sovereign power of nominating and providing heirs to a Peerage. So far from females being excluded from succeeding to Peerages at the period in question, two of the Patents expressly provide for their inheriting the Earldoms thereby created.

The right of nominating successors to the Barony of Rutherford contained in the Patent of Creation in 1661 was not new. Such a power of nomination had been conferred soon after the Union of the Crowns of England and Scotland and it was continued down to the Union of these Kingdoms, when Peers of Scotland ceased to be created.

One of the earliest instances of this right of nomination occurs in the Patent of the Barony of Hume of Berwicke in favour of Sir George Hume, who was afterwards created Earl of Dunbar. That Patent was granted by James I of England on the 7th of July, 1604, to the Grantee and his heirs general for ever, with the privilege of nominating heirs and assignees to the dignity from among his cousins and relatives by Settlement or last Will.

Similar rights of nomination were given in subsequent Patents by James VI and the successive Sovereigns, down to and including Queen Anne, who, in the year 1707, conferred this power in re-grants to the Earl of Kilmarnock and to the Earl of Stair. One of the substitutions in the re-grant of the latter title is in these terms : " To such person or persons descended of " the said James Viscount of Stair as the said Earl should nominate and " appoint by writing under his hand, at any time during his life,—and failing " such nomination or the persons so nominated," &c.

III. Limitations of the Ruthven Estates.

The Estates of Freeland, Kirktonmailar, and others, which belonged to Sir Thomas Ruthven at the time of his Creation as Lord Ruthven, between 1651 and 1661, were all limited and descendible to heirs and assignees, these, of course, including females. After his Creation as Lord Ruthven, and a few years before his death, he obtained a Crown Charter of part of his lands,—and it is probable that he had intended to execute an Entail regulating the succession after his death, in the same terms, it will be shown, as his son did, so soon as he had completed his feudal title as heir to his father in the Territorial subjects.

Thomas, the first Lord, died in 1671. David, his son and successor, as second Lord, made up titles to different portions of the lands in the years 1673–1674. His infeftment, proceeding on a Crown Charter, in the lands of Mailar, is dated 20th May, 1674. As soon as these titles were completed, and before infeftments in other parts of the Estate were expede, David Lord Ruthven executed, of this date, a nomination and designation of heirs to succeed to him in all his " lands, liveing and estate." 26th October, 1674.

This nomination proceeds on the following narrative : " Me David Lord " Ruthven of Frieland heritable proprietor of the lands and others under " written with the pertinents—Forasmeikle as my lands, liveing and estate after " specified are come to my hands be derivation from my carefull predecessors, " *and that be my Infeftments thereof standing in my person I have full* " *privilege and power, at any time during my lifetime, to nominate and designe* " *be my declaration subscrived with my hand in presence of famous witnesses* " *the person or persons, ane or mae, whom I would have to succeed to me therein* " *successive ane after another* (failing heirs lawfully to be begotten of my own " bodie) and that the persons, ane or mae, so to be designed as said is, shall

" have the right, title, and benefit of succession to me in the samen, with and " under the conditions, provisions, reservations, restrictions and limitations to be " contained in the said Nomination or Declaration, and being now fully resolved " to make the said Nomination, To the effect that the heretable right, fee and " succession of all my lands, liveing and estate after specified presently pertaining " to me, or which shall happen to accresce, pertain and belong to me at any " time hereafter, be established in the persons successive after mentioned, with " and under the express conditions, limitations and restrictions after specified " —Therefore and for the special love and favour which I bear to Mrs. Jean " Ruthven, my lawful youngest sister procreat betwixt the deceast Thomas " Lord Ruthven my father and Dam Isabella Balfour my mother, and others " underwritten, and for sundrie other onerous causes and good considerations " moveing me, Witt ye me To have nominated and designed and be the tenor " hereof with and under the express conditions, reservations, provisions, " restrictions and limitations after specified, and no otherwayes, I nominate and " designe the said Mrs. Jean Ruthven and the heirs male lawfully to be " begotten of her body (they assuming and taking on them the sirname and " armes of Ruthven and bearing and using the same without any change " thereof) in manner after mentioned—and failzeing of heirs male lawfully to " be begotten of her body, the eldest daughter or heir female lawfully to be " begotten of the body of the said Mrs. Jean Ruthven but division, and " failzeing of her and the heirs male and female lawfully to be begotten of her " body, In that case the next eldest daughter and heir female immediately " younger (but division likeways) to be lawfully begotten of the said Mrs. " Jean Ruthven her bodie, and sua furth failzieing of the eldest to the " immediate younger daughter frae daughter and heir female to daughter and " heir female successive, so long as there shall be any succession or person " extant lawfully procreat of the said Mrs. Jean Ruthven her body, They " always bearing the sirname and arms of Ruthven, as said is, and observing " the haill other conditions and provisions after specified in manner under- " written—Which failzieing Dam Anna Ruthven now Lady Craigends, and the " heirs male lawfully gotten or to be gotten of her body (they assuming the " name and arms of Ruthven as said is) whilks failzieing Isabella Ruthven, " daughter to Sir Francis Ruthven of Reidcastle Knight, procreat betwixt the " said Sir Francis and the deceast Dam Elizabeth Ruthven, my lawful second " Sister, and the heirs male of her bodie, and failzieing of heirs male lawfully " to be begotten of the said Isabella Ruthven her body The eldest daughter " or heir female lawfully to be begotten of the said Isabella her body, but " division, and faillzieing of her and the heirs male and female to be begotten " of her body, In that case the next eldest daughter and heir female imme- " diately younger, but division, to be begotten of the said Isabella Ruthven " her bodie, and sua forth failzieing of the eldest to the immediately younger, " from daughter and heir female to daughter and heir female successive, so " long as there shall be any succession or person extant lawfully procreat of " the said Isabella Ruthven her body—They always bearing and useing the " sirname and arms of Ruthven as said is, which failzeing " to certain other heirs therein named. Then follows a description of the lands of Freeland and others, and various declarations and provisions to be observed by the heirs nominated by virtue of " this present nomination or any other nomination or " declaration to be subscribed by me in their favours."

The power of nominating heirs to succeed him, which is referred to in this nomination, as contained in Lord David's "Infeftments," is not specified in the title deeds to his Territorial Estates, and in the absence of such a power in them, this right of nomination must have reference to a clause *in the Patent of his Peerage allowing the heirs in the Infeftments of his Estates nominated or to be nominated to inherit* the dignity.

David, second Lord Ruthven, enjoyed the Dignity and Estates down to the year 1701, when he died unmarried. The dignity and estates were inherited and have since been enjoyed in terms of the nomination and designations of heirs executed by him.

IV. Descent of the Title to heirs male and female, according as the succession opened to them, for nearly two centuries.

From the Creation of the Title of Lord Ruthven, down to the present time, it has been uninterruptedly enjoyed by the heirs male and female of the body of the first Lord, according as the succession opened to males and females, without challenge, as will appear from the following statement of the descent :—

David, the second Lord, succeeded to his father in 1671, and died in 1701. He was succeeded by his youngest sister Jean, who immediately became Lady or Baroness Ruthven. She possessed both the title and the estates from 1701 to April, 1722, when she died unmarried. The following evidence of her having enjoyed the title has been found in the course of the present inquiries :—

1. Instrument of Sasine, dated the 10th, and recorded in the Particular Register of Sasines, &c., for the Sheriffdom of Perth, the 22nd day of December, 1702, in favor of "*Jean Lady Ruthven,*" of an annualrent of £128 Scots, corresponding to the sum of 3,200 merks, forth of the lands of Forgandenny, belonging to David Oliphant, of Coltowhar, proceeding on an Heritable Bond by him "*to the said Jean Lady Ruthven.*" She is invariably styled Jean Lady Ruthven wherever she is mentioned throughout this Instrument.

As her brother David, the second Lord Ruthven, died in 1701, and as Jean is here proved to have been styled Lady Ruthven in the following year, it may be presumed that she had adopted and received that designation immediately on the death of her brother.

2. Renunciation and Discharge recorded in the said Particular Register of Sasines on the 10th of December, 1709, granted by "*Jean Lady Ruthven,*" in favor of the said David Oliphant of the said annualrent.
3. Instrument of Sasine, dated the 26th, and recorded in the said Particular Register of Sasines on the penult day of January, 1712, in favor of "*ane noble Lady Jean Lady Ruthven,*" of subjects in Forteviot, on Disposition by Mrs. Janet Chapman, daughter of the deceased Robert Chapman, of Coblehaugh, to the said "*Jean Lady Ruthven.*"
4. Assignation, dated 27th April, 1721, by "*Jean Lady Ruthven,*" in favor of Mrs. Isabell Ruthven, her Niece, spouse of Colonel James Johnston, of Graitnie, in liferent, and James and Ann Johnstons, their lawful children, in fee, of the several sums of money therein specified.
5. On the 9th September, 1721, *Jean Lady Ruthven* was served heir in special of her brother David Lord Ruthven, in the lands of Freeland and others, in which he died infeft. This service was expede in the Sheriff Court of Perth, before Mr Robert Craigie, of Carie,

Advocate, Sheriff Depute of the said Sheriffdom, in virtue of a Dispensation from the Lords of Council and Session, and the Inquest consisted of the then Provost of Perth, his predecessor in that office, several of the Bailies of that burgh, and other gentlemen connected with Perthshire, to whom the Ruthven family must have been well known : "Qui jurati dicunt magno sacramento interveniente Quod "quondam David Dominus Ruthven frater germanus *Jeannæ* "*Dominæ Ruthven* latricis presentium obiit ultimo vestitus et sasitus "ut de feodo ad fidem et pacem quondam Supremi Domini nostri "Gulielmi Regis beatæ memoriæ in totis et integris terris Baroniis "aliisque subscript." * * * * "*Et quod dict Jeanna Domina* "*Ruthven* est legitima et propinquior hæres tallie et provisionis præfat "demortuo Davidi Domino Ruthven suo fratri germano nominat "designat et succeden. In totis et integris terris Baroniis."—— "Ad dict Davidem Dominum Ruthven spectan secundum formam et "tenorem nominationis, declarationis, resignationis et juris talliæ et "provisionis per dict quondam Davidem Dominum Ruthven in "favorem præfat *Jeannæ Dominæ Ruthven* præsentium latricis "aliorumque hæredum talliæ et provisionis postea mentionat." Dated 26th October, 1674, the said "*Jeannam Dominam Ruthven* "inibi magistram Jeannam Ruthven designat"—"et quod Totæ et "Integræ terræ Baronia," &c., "in quibus dict David Dominus "Ruthven frater dict *Jeannæ Dominæ Ruthven* presentium latricis "obijt ultimo vestit et sasit tanquam in feodo modo prædict nunc "existunt prout extiterint in manibus superiorum earund respective "continuo a tempore decessus dict quondam Davidis Domini Ruthven "qui obijt — die mensis Aprilis, 1701. Et ita per spatium viginti "annorum aut eo circa ratione nonintroitus et in defectu dict Jeannæ "Dominæ Ruthven sui veri et legitimi hæredis jus suum minimæ "prosequen."

This Service was duly retoured to Chancery, and an Extract is preserved in the Freeland Charter Chest, certified by Lord Charles Kerr, then Director of Chancery.

Jean, Lady Ruthven, died soon after the date of this Service, and before her title was completed by Sasine. She survived her brother exactly 21 years —from April 1701 to April 1722, and during the whole of that period she herself took and received from others the style and title of honor of Lady Ruthven.

The delay which occurred in Lady Jean making up a feudal title to the territorial subjects, which she inherited from her Brother, for so long a period after his death, was probably owing to the informality of the nomination of heirs executed by him in 1674. It contained no dispositive clause, and also wanted both a Procuratory and a Precept. Lady Jean was not the heir at law of Lord David, and she may have experienced some difficulty in the completion of her feudal title. Anne Ruthven the eldest sister of Lord David, and her descendents, and also the only daughter of the deceased Isabel Ruthven, the second sister, were both postponed to his youngest sister Jean in the Nomination. Anne Ruthven predeceased her brother Lord David, but she left a son, Sir William Cunninghame, who may have been disposed to take any advantage of the informality of that instrument, and to throw obstacles in the

way of Jean completing her title. Indications of this appear in the Assignation before mentioned, executed by her in favor of her Niece Isabel in 1721, in the following terms: "Provided always that if the said Sir William Cunninghame "shall happen to refuse, decline or delay to perform the deeds, conditions and "provisions for strengthening the Taillie of my Estate made by the now "deceased David Lord Ruthven my Brother german of the date the 26th "October 1674, in the terms I have obliged the said Sir William thereto by a "Discharge dated the 20th day of April last past (1716) granted by me to "him of 19,000 merks Scots money principal and annualrents and liquidate "expenses due by him to me by the two Bonds therein narrated, then and in "that case the said Sir William Cunninghame should be and hereby is not "only utterly deprived of any benefit and advantage that might be competent "to him in virtue of this present Assignation, but also of all benefit and "interest" under certain writs executed by her on 5th October, 1716.

SIR WILLIAM CUNNINGHAME RUTHVEN.

On the death of Jean Lady Ruthven in April 1722, the succession opened to her Nephew Sir William Cunninghame of Cunninghamhead, who, as already stated, was son of Dame Anne Ruthven, the eldest daughter of Thomas the first Lord.

Sir William only possessed the Estate of Freeland for the short space of six months, having died in October 1722. Although he took the sirname of Ruthven, he does not appear to have assumed the title of Lord Ruthven during that period, and he had probably delayed doing so, until his Service was expede,—But he died before this could be done.

ISABEL, SECOND LADY RUTHVEN.

Sir William Cunninghame Ruthven was succeeded by his Cousin Isabel, only daughter of his Aunt Elizabeth Ruthven and Sir Francis Ruthven of Reidcastle, her husband. *Record*, vol. II, p. 395.

On the 8th March, 1723, the Commissary of Dunkeld confirmed the Testament Dative and Inventar of the goods, gear, sums of money and debts that pertained to the "*deceast Jean Lady Ruthven*," who died in April 1722, in favor of "*Isobell now Lady Ruthven*, Executrix Dative ad non executa and "qua nearest of kin to the foresaid deccast *Jean Lady Ruthven* her Aunt." Reference is made in this Confirmation to a previous one erroneously expede by Sir William Cunninghame Ruthven, which was not acted upon, and was ultimately superseded by the new Confirmation in favor of Isobel Lady Ruthven. It is, therefore, unnecessary to notice it farther.

On 28th March, 1723, the Commissary of Dunkeld confirmed the Testament Dative and Inventar of the goods, &c., that pertained to umquhile Sir William Ruthven alias Cunninghame of Cunninghamhead at the time of his decease, which was in October 1722, made and given up by "*Isobel Lady Ruthven*" and her husband, Executors Dative qua Creditors.

Various eiks or additions were made to the Confirmed Testaments of "Jean Lady Ruthven" and Sir William Ruthven or Cunninghame, by Isobel Lady Ruthven and her two children, James and Anna Ruthven.

Besides making up titles to the Personal Estate, the following Services were expede in the Sheriff Court at Perth on the 19th March, 1723, in favor of Isobel :—

1. Special Service to David Lord Ruthven, her uncle, in the lands of Freeland and others, in which she is designated "Isabellæ Ruthven "filiæ demortui Domini Francisci Ruthven de Reidcastle procreat "inter eum et demortuam Dominam Elizabetham Ruthven sororem "natu secundam dict quondam Davidis Domini Ruthven." This designation is taken from the Nomination executed by Lord David in 1674, which it was correct to adopt, as that Nomination was the foundation of the special Service. The Brieve from Chancery bears date 5 February, 1723, only about three months after the death of Sir William Cunninghame Ruthven, and Isobel had not then adopted the title of Lady Ruthven.
2. Service of Isobel, as heir of line to the deceased David Lord Ruthven her uncle, and also heir of taillie and provision under the nomination of 1674 in favor of "demortuam *Dominam Jeannam Ruthven*," his eldest sister, whom failing the other heirs therein named.
3. Service of Isobel, as heir of provision to her aunt "*Jean Lady Ruthven*," under the said Nomination.

None of these Services appear to have been retoured to Chancery, and no Sasine was expede in favor of Isobel.

Isobel died in June, 1732, as appears from the Confirmation of her Testament on 19th September of that year, given up by her son James, in which she is designated "*Umq*^{t}. *Isobell Lady* Ruthven, spouse to Colonel James "Ruthven of Graitney," and it will be shown that the same designation is applied to her in the Service expede by her son. She was succeeded in the title and estates by her only son,

JAMES, THIRD LORD RUTHVEN.

As his Service was to be carried through immediately after the death of his mother, he delayed, according to the ancient practice, adopting the designation of Lord Ruthven, at least in legal instruments, till the Service proceedings were completed. It is necessary to notice these proceedings to shew that Isobel was then recognised by the Crown Officers as Lady Ruthven.

1. A Procuratory was granted on 1st November, 1732, for expeding the Service of James Ruthven, of Ruthven, to the deceased David Lord Ruthven, his granduncle. James Ruthven is designated in that Procuratory as "only lawful son procreat betwixt Isabella Ruthven "*Lady Ruthven* and Colonel James Ruthven, alias Johnston, of "Graitney."
2. A Commission was granted by King George II, under the Testimony of the Seal appointed to be kept in place of the Great Seal, on 17th November, 1732. This Commission narrates that "Jacobus Ruthven "de Ruthven unicus filius legitimus procreat inter Isabellam Ruthven "*Dominam Ruthven* et Colonellum Jacobum Ruthven alias Johnston

" de Graitney ejus maritum," had purchased Brieves for being served heir male of Taillie and Provision to the deceased David Lord Ruthven his Granduncle, as well in general as in special, and granting Commission for that purpose.

3. In the Claim of Service both Jean and Isobel Ruthven are repeatedly designated as "Lady Ruthven." The Inquest consisted of Sir James Fergusson of Kilkerran, Baronet, Chancellor, Colonel William Douglas of Kirkness, Mr. Lawrence Craigie of Kilgraston, Mr. David Graham of Orchill, Mr. Henry Home, Advocate (afterwards Lord Kames), and other gentlemen who appear to have been well acquainted with the family. Two of the Inquest, Mr. Lawrence Craigie, and Mr. Robert Fullarton, W.S., deponed to the propinquity of the Claimant, that he was only lawful son of "*Isobel Lady* "*Ruthven*," and the Inquest unanimously sustained the claim of service on the 9th December, 1732.
4. In all the Acts of Court, Instruments, &ca., Isabella Ruthven is designated "Lady Ruthven," which title was accorded to her throughout the whole proceedings.

The character of Sir James Fergusson, who acted as Chancellor on this Service, is thus drawn by Lord Woodhouselee :—"He was undoubtedly one of " the ablest lawyers of his time. His knowledge was founded on a thorough " acquaintance with the Roman Jurisprudence, imbibed from the best Com- " mentators on the Pandects, and with the recondite learning of Craig, who had " laid open the fountains of the Scottish Law in all that regards the system of " feudalism. Of his manner as a Barrister, we have no other record than the " printed papers of his composition, which evince a skilful arrangement of his " matter, a judicious selection of his ground of argument, and a nervous brevity " of expression which admits of no rhetorical embellishments. The probity and " integrity of his moral character entitled him to respect and veneration. The " decisions which he has recorded during the period when he sat as a Judge of " the Supreme Court exhibit the clearest comprehension of Jurisprudence, and " will for ever serve as a model for the most useful forms of Law Reports."

Lord Kames, who was also one of the Inquest, on the Service of James, third Lord Ruthven, besides being a distinguished lawyer, wrote a *Treatise on Scotch Peerages*, and must have known the true state of the Ruthven Peerage.

Having expede a Service to his granduncle Lord David, James Ruthven was thereafter infeft in those parts of the Estate which hold of the Crown on a precept from Chancery. He adopted the title of honor of Lord Ruthven, and enjoyed all the privileges pertaining thereto. In particular, he exercised his right of voting at the Election of Peers from the year 1733 to the year 1774, either personally, or by signed list or proxy, on the following occasions, viz. :—

1. On 21 September, 1733, personally, when the Duke of Atholl was elected in the room of the Earl of Sutherland deceased.
2. On 14 March, 1738, by a signed list, when John, Earl of Hyndford, was elected in room of the Earl of Morton deceased.
3. On 12 May, 1739, by a signed list, when the Earl of Morton was elected in room of the Earl of Selkirk deceased.
4. On 1 August, 1747, personally, at the General Election.

5. On 5 May, 1761, personally, at the General Election.
6. On 8 March, 1763, personally, when the Earl of Sutherland was elected in room of the Marquis of Tweeddale.
7. On 21 August, 1766, by proxy, to the Duke of Atholl, when his Grace was elected.
8. On 1 October, 1767, personally, when the Duke of Gordon and the Earl of Strathmore were elected.
9. On 26 April, 1768, personally, at the General Election, which was much contested.
10. On 17 January, 1770, personally, when the Earl of Errol was elected.
11. On 15 November, 1774, by proxy, to the Earl of Leven at the General Election.

None of these votes were objected to by any person.

James, third Lord Ruthven, and his Lady, were commanded to attend the Coronation of George III and his Queen, on the 22nd September, 1761, in their rank and quality. This letter is superscribed by the King, and countersigned by the Earl of Effingham as Earl Marshal, from whom there is a separate letter addressed to "Lord Ruthven," desiring to be informed if he could attend "the Coronation, to the end that room may be prepared for such "Peers and Peeresses as shall be present."

Similar letters were addressed respectively to Jean and Isobel Ladies Ruthven, to attend the Coronations of George I and George II, in their character of Peeresses, although the letters were destroyed when the old house of Freeland was burned in 1750.

James, third Lord Ruthven, died at Edinburgh on 3rd July, 1783, and was succeeded by his eldest son,

JAMES, FOURTH LORD RUTHVEN.

He attended and voted at the General Election of Peers on 8th May, 1784. He only enjoyed the title for six years, having died in 1789. His eldest son was

JAMES, FIFTH LORD RUTHVEN,

succeeded his father in 1789. He expede a Title as heir to his Grandfather as follows :—

1. Retour of the General Service on 4 July, 1792, of James, Lord Ruthven to his Grandfather, in these terms :—

"Qui jurati dicunt magno sacramento interveniente Quod quon-
"dam *Jacobus Dominus Ruthven avus Jacobi nunc Domini* Ruthven
"latoris præsentium filii natu maximi Jacobi Ruthven *postea*
"*Domini Ruthven* nunc demortui qui unicus filius fuit et unica
"proles vivens nuptiis inter dict quondam *Jacobum Dominum*
"*Ruthven et Janetam Dominam Ruthven* ejus uxorem, filiam
"Gulielmi Nisbet de Dirleton obijt ad fidem et pacem S. D. N.
"Regis. Et quod dictus Jacobus Dominus Ruthven lator præsen-

" tium est legitimis et propinquior hæres tailliæ et provisionis in " generali dict. quondam Jacobi Domini Ruthven avi sui," in terms of the Entail executed by him on 2nd May, 1775.

2. Upon the 20th December, 1792, the Procurator for "James, Lord " Ruthven," " in the presence of the Lords Barons of His Majesty's " Court of Exchequer," resigned the lands of Freeland and others " in the hands of James Montgomery, Esquire, Lord Chief Baron of " His Majesty's Court of Exchequer, for himself and in the name of " the remanent Barons thereof, as in the hands of His Majesty," " In favor and for new Infeftment" " to the said *James now Lord* " *Ruthven*, eldest son of *James Lord Ruthven*, who was only son and " the only child living of the marriage between *James Lord Ruthven* " and the deceast *Janet Lady Ruthven*, daughter of William Nisbet, " Esquire, of Dirleton."

3. Crown Charter of Resignation following thereon, dated 20th December, 1792, whereby the King gave, granted, and confirmed, " confeso et " Dilecto nostro consanguineo *Jacobo nunc Domino Ruthven*, filio " natu maximo *Jacobi Domini Ruthven*, qui filius solus erat et proles " viven, ex maritagio, inter *Jacobum Dominum Ruthven* et *demor-* " *tuam Janetam Dominam* Ruthven, filiam Gulielmi Nisbet, Armigeri " de Dirleton."

4. Instrument of Sasine following thereon in favor of James, Lord Ruthven, dated 19th February, and recorded in the Particular Register at Perth, the 30th March, 1793.

On the 25th June, 1847, an Act of Parliament was passed (10 and 11 Vict., cap. 52), " for the correction of certain abuses which have frequently " prevailed at the Elections of Representative Peers for Scotland." Part of the preamble of that Act thus refers to the Roll of Peers made up in 1707: " And " whereas an *authentic List* of the Peerage of the North part of Great Britain, " called Scotland, as it stood the first day of May, 1707, was returned to the " House of Lords the 22nd day of December, 1707, and entered into the Roll of " Peers, by order of the House of Lords, on the 12th day of February, 1708, to " which List sundry Peerages of Scotland have since been added by order of the " House of Lords at different times, which List of the said Peerage is called at " the Election of a Peer or Peers to represent the Peerage of Scotland in the " Parliament of Great Britain and Ireland."

In terms of this Act a new Roll was prepared of the Peerage of Scotland, in which Lord Ruthven is entered between Lords Rollo and Nairn.

James, fifth Lord Ruthven, was recognised as such by the Crown, and exercised all the rights pertaining to the Peerage by voting at the Election of Peers and otherwise. He enjoyed the title uninterruptedly till his death, in the present year (1853), when he was succeeded by his only surviving sister,

MARY ELIZABETH THORNTON RUTHVEN, or HORE, Third LADY or BARONESS RUTHVEN.

She expede a Service before the Sheriff of Perthshire, under the designation of Lady or Baroness Ruthven, and this has been followed by infeftment. October, 1853.

The possession of the Title has thus been uninterrupted from the original Creation in 1651 down to the present time, and was as fully adopted by females, when the succession opened to them, as by males. Since the first female succession to the Dignity, in 1701, the title has been enjoyed by herself and her successors, male and female, for upwards of a century and a half.

In addition to the evidence which has been noticed of the descent and possession of the title in the persons of the successive Peers and Peeresses, there is evidence of a general nature applicable to several periods of the succession, which also requires to be stated.

On the 12th June, 1739, the House of Lords ordered, "That the Lords of "Session in Scotland do make up a Roll or List of the Peers of Scotland *at the* "*time of the Union, whose Peerages are still continuing.*"

The return was made on 27 February, 1740. It commences with a reference to the Roll of Peers at the time of the Union. The Lords of Session found a writing entituled "Roll of Parliament, 1706," bearing, first, a List of the Peers according to their rank, next a "List of Commissioners from Shires "to that Parliament, and then a List of the Commissioners from Boroughs, and "this writing, some of the officers who were then employed under the Lord "Register say, was the very Roll or List that was daily called over in the last "Parliament of Scotland, pursuant to the constant practice of calling over the "Roll both of Peers and Commons who sat together in one house before the "house proceeded to business, and also of collecting the voices by calling over "the Rolls when any point was to be resolved by a question. They also found "that this Roll or List has, ever since the Union, *been looked upon as authentic*, "and that copies thereof, so far as concerns the Peerage, have been made use "of, with some additions hereafter to be mentioned, and called over at every "meeting of the Peers of Scotland for the Election of one or more Peers to "serve in the Parliament of Great Britain, from the year 1708 down to this "time."

"They further report that this Roll or List of Peers, which they consider "as that which was *de praxi* made use of, and called over in the last Parlia-"ment of Scotland, in which the Union was enacted, and therefore deemed to "be a true one," &c.

In this Roll of 1706 the Lord Ruthven is entered between Lords Colville and Rutherford, the former having been created in the year 1651, and the latter in the year 1661.

The Roll of 1706 must have been prepared in that year so as to include the Commissioners who had been elected for the respective Shires and Burghs. But in so far as it related to the Peers, who were hereditary and not elective, like the Commissioners, the Clerks of Parliament had included *those whose Peerages were then subsisting*, and the Roll affords evidence that the Ruthven Peerage still subsisted in the person of Jean Lady Ruthven, and had not become extinct five years before on the death of her Brother, in 1701. If the title had died with him, it would not have been continued in the Roll of Parliament as a subsisting Peerage.

But this is not the only Roll showing the existence of the Ruthven Title after the death of David, the Second Lord. On the 22nd of December, 1707, the House of Lords ordered that the Lord Clerk Register for Scotland, "do "forthwith lay before this House an *authentic List* of the Peerage of that part "of Great Britain called Scotland, as it stood the 1st day of May last."

On the 26th of January, 1708, it was ordered by the House of Lords, " That the List or Order of the Peers of the North part of Great Britain called " Scotland, attested by the Clerk Register, be received and entered into the " Rolls of Peers."

In this List " Lord Ruthven " is again entered between Lord Colvill and Lord Rutherford. It is entituled " an *authentic List* of the Peerage of the " North part of Great Britain called Scotland as it stood the first day of May, " 1707, and it is attested by Sir James Murray of Philiphaugh, one of the " Senators of the College of Justice, Clerk to Her Majesty's Councils, Registers " and Rolls."

The Title of Lord Ruthven is thus deliberately included in an authentic List of the Scottish Peerage, as it existed at the date of the Union between England and Scotland. This List was made up only six years after the death of David Lord Ruthven, and by those Officers who had sat with him in the Parliament of Scotland. He was a well known public character, who had recently died unmarried, and it had been equally well known that his title of honor did not die with him, but had descended to and was actually used by his sister Jean, and so fell to be continued in the authentic List of the Peerage in 1707.

The Lords of Session, in their Peerage Return, dated in 1740, certify " that the Roll or List of the Peers of Scotland stands at present, so far as " with certainty appears to them, thus." In the List of Lords then given Ruthven is again placed betwen Colvill and Rutherford.

This Return was made about seven years only after the death of Isobel, second Lady Ruthven, and the succession of her son James, the third Lord, at whose Service as before stated Sir James Fergusson of Kilkerran, one of the Lords of Session at the date of the Peerage Return, acted as Chancellor. Unless it had been well known to the Lords of Session, that the right of James, the then possessor, to the dignity was unquestionable, they would either have left it out altogether, as they did other Peerages which were not existing, or they would have included this Peerage in a long list, extending to not fewer than twenty-five of other Titles, accompanied " with such observations as leave " it doubtful whether the persons claiming some of the said Peerages have " sufficient right thereto, or as lead them to think that several particular " Peerages in the above written Roll or List are extinct or joined in the same " person with other Peerages not again to be separated."

The Lords of Session conclude their Report with a reference to the practice of Scotland, by which " it was usual to obtain grants of honours not " only to the Grantee and his heirs male and of Tailzie, referring to the " particular Entail then made, *but also to his heirs of Tailzie whom he might " thereafter appoint to succeed him in his Estates*, and even to any person " whom he should name to succeed him in his honours, at any time in his life, " or upon death bed."

The Report by the Lords of Session is signed by Duncan Forbes, then Lord President. While at the Bar, he acquired, as Counsel in the Lovat Peerage Case, an intimate knowledge of the Constitution and Descent of Scotch Peerages, which were investigated and discussed with much keenness by the opposing parties.

Lord Mansfield alludes, in the Cassillis Case, to President Forbes, as one of the able Counsel who argued the Lovat Case.

Burton's *Life of Duncan Forbes*, p. 362.

The labours of President Forbes in connection with the Peerage Return to the House of Lords, is thus noticed by his Biographer :—" At the desire of the " House of Lords, and for the purpose of preserving a permanent record of " those entitled to the privileges of Peerage, an enquiry involving the most " arduous antiquarian and genealogical investigations, was instituted and " conducted entirely by the President, to supply, as far as practicable, the want " indicated by the House of Lords. On the 29th of February, he transmitted " to the Lord Chancellor, as the fruit of his research, a full critical report on " the origin and history of the several Scottish Peerages."

The whole circumstances and evidence connected with the inheritance and possession of the Ruthven Peerage by Jean Lady Ruthven, on the death of her brother, leave no room for doubt that it comes within the class of Cases referred to by the Lords of Session in the conclusion of their valuable Report, as above quoted.

The Case might have been fitly closed at this stage, were it not that a learned author, who has devoted much attention to the Peerage Law of Scotland, has stated various objections against the possession of the title, in a work published in the year 1833. These objections being urged with much confidence, and having a tendency to influence those who are not fully acquainted with the merits of this Case, it is necessary to notice them.

Mr. Riddle's *Scotch Peerage Law.*

He maintains in point of law, that " in all ordinary cases the House of " Lords adopt the principle that where the Patent is not extant, the honours " alone descend to the heirs male of the body of the person first ennobled."

This is a very partial exposition of the law. The general presumption certainly is in favor of heirs male, subject, however, to this condition, that it is always liable *to be done away by the facts of each particular case.* This will be shown particularly under the last head of this Memorial. The learned author has overlooked this important maxim, and which is so specially applicable to the present case.

He is equally mistaken in maintaining that " the want of the Patent is a " vital defect, that is not to be atoned for or compensated by any possible " adminicle or presumption." So far from this being true, it has been decided, as will be seen more fully under the last head, that the loss of the Instrument (of Limitation or Patent) " won't prevent the Court from proceed- " ing on those grounds," " raising a presumption " " for discovering the heirs " entitled to succeed."

P. 85 *infra.*

The learned author has thus misrepresented the law of the House of Lords, by only stating one half of it, which suited his purpose, and with-holding the other half, which is inconsistent with his argument.

Passing for the present from his bad law, his alleged facts and new evidence will be next examined.

He alludes to Douglas's account of the descent of the Dignity contained in his Peerage work, and points out certain minor inaccuracies into which Douglas had fallen from want of full information. It is only necessary to notice such of the objections as appear to be of any importance.

His first objection is to the Roll of 1706, which continues the Ruthven Peerage, after the death of Lord David. He says that it is not " drawn up " with exactitude ; besides Ruthven, it contains the names of Peerages that " did not exist at the time, and after the Union it was not the custom to " withdraw Peerages from the Roll when they had become extinct."

No instances of the alleged want of exactitude are given, and the best

evidence of the accuracy of the Roll of 1706 is to be found in the fact that it was, with a single exception, adopted in an Official Return, in the following year, as an "*authentic List*" of the Peerage at 1st May, 1707. The exception alluded to was the addition of the Earl of Solway to the List of Earls, which is fully explained in the Return of the Lords of Session. The Roll of 1706 was again adopted in that Return, after making the necessary alterations in the Peerage which had occurred in the interval between the years 1706 and 1740. Even so late as the year 1847, the Roll of 1707 was narrated as an "authentic "List" in the Act of Parliament passed in that year for purifying errors which had crept into the Roll previous to that date; and of the new Roll, which was prepared in terms of that Act, the Roll of 1707 formed the basis, as stated in the preamble of the former.

The Roll of 1706 was repeatedly ratified; first, in the year following its preparation by the Lord Clerk Register, as Clerk of the Scottish Parliament; again, after a considerable interval, in 1740, by the learned and impartial Judges of the Court of Session; and, a third time, after a still longer interval, in the year 1847, by the authority of Parliament and the present Lord Clerk Register. These repeated adoptions afford the best evidence of the accuracy of the Roll of 1706.

That Roll was not prepared "after the Union," as the learned author indicates. It bears to have been prepared *before* the Union, and at that time it was the practice to withdraw Peerages from the Rolls of Parliament when they became extinct, and even when they merely merged in a higher Dignity. Thus, when the Earldom of Tullibardine ceased to be a separate Dignity, by merging in the Marquisate of Atholl, it was ordered by Parliament, on 23rd April, 1685, "That Tullibardin be expunged out of the Rolls of Parliament, "in regaird the Estate and Title thereof is in the person of the Marquis of "Atholl." Acts of Parliament, vol. viii, p. 457.

The learned author omits to notice that the Lords of Session state in their Return that "they left out such of the Peers in the List of 1706 as they were "warranted to leave out by legal evidence."

He next quotes a part of the Return by the Lords, in which he represents them "as confessing their inability to give any reasonable satisfaction touching "the limitation of the Peerages that are still continuing." But this admits of a simple explanation. The House of Lords ordered two things to be furnished to them by the Scotch Judges:—1st, a Roll of Peers at the Union, whose "Peerages are still continuing;" and 2nd, the "Particular limitations of such "Peerages, as far as they are able to state them."

The Lords furnished the Roll of existing Peers, but they explained, by reference to the practice of resigning Peerages and giving the Grantees power of nominating heirs (which nominations were often not recorded), why they were unable to furnish the limitations. The Lords do not express any doubt of the *actual existence* of those Peerages, the limitations of which they could not supply; and, indeed, it is in those cases where they were able to supply the limitations that they raise doubts of the validity of the Dignities, owing to the peculiar terms of these limitations.

The learned author farther says, that the Lords of Session prudently enough refrained from any remark upon the Ruthven Peerage "in the state of "uncertainty" regarding it. Such a remark might have had some weight if the Lords had in the real cases of uncertainty also refrained from remark; but they did not do so. They specially call attention to all cases which they

consider doubtful, as contra-distinguished from those about which they had no doubt. The Ruthven Case did not appear doubtful to the Lords of Session in the year 1740.

The learned author then adduces what he calls the "opposing evidence," which consists of three parts. The first is *Crawfurd's Peerage*, in which it is stated that the honour became extinct on the death of David the second Lord, unmarried.

That book* was published in the year 1716. After a long interval, Crawfurd, in the year 1734, investigated the right as to this Peerage in a far more careful manner than he had an opportunity of doing for his general work. He prepared a Memorial of the right of James the third Lord, which contains this statement: "There can, in my humble opinion, be no difficulty but that "James Lord Ruthven, son and heir of the late Ladie Ruthven, *is well entitled* "*to this dignitie.*"

The second fact adduced by the learned author is the existence of Sir William Cunninghame, who did not claim the dignity after the death of his uncle, Lord David, from 1701 to 1722.

It has, however, been already explained, that both Sir William and his mother, who was the eldest sister, were postponed in the nomination of 1674 to the youngest sister Jean, who took the title and estates under that nomination, and was acknowledged as Lady Ruthven by her niece Isobel, who herself afterwards succeeded to the Dignity. When the succession opened to Sir William himself under the nomination, he only survived a few months. Without having had time to make up his feudal title, he does not appear to have assumed the Dignity of Lord Ruthven.

The learned author represents Isobel as having succeeded to David, and as having received a summons to the Coronation of George I in 1714, and then Jean as succeeding to Isobel, and James the third Lord as the successor of Jean. But these are all plain mistakes, proceeding upon ignorance of the facts connected with the succession, and need not be particularly refuted.

The third part of the opposing evidence consists of a quotation from a manuscript in the Advocates' Library, to the effect that the Patent of the Ruthven Peerage is dated 3rd January, 1651, and was limited to the Patentee and his heirs male.

The learned author does not explain that this manuscript was written so lately as the year 1751, and after the Ruthven Patent, it is understood was lost. The manuscript is a careless compilation by some anonymous hand, and transcribed among Macfarlane's Manuscript Collections. It contains a "List "of Creations of Lords of Parliament since that Dignity came to be constitute "by Letters Patent Anno"—(leaving the year blank).

In this List the Patents of the Rollo and Colville Peerages are entered immediately before that of Ruthven. The first is said to be dated 10th January, 1651, and the second the 4th of that month, while the Ruthven Patent is stated to have been a day later. The limitations of the Rollo Patent are stated from the original "*in the custody of Lord Rollo,*" and that of

* With some inconsistency the learned author makes a Peerage work the first or chief evidence in support of his statements, although, at the outset of his remarks, he is very unsparing against such works. He says: "Flagrant error nowhere abounds so plenteously as in the works "of our Peerage writers, who, to use the words of Chalmers, in the form of fiction, 'are continu-"'ally darkening the clear, without clearing the dark.'" Yet it is to a Peerage writer that the author appeals mainly in this case.

Colville from the original Patent "*in the hands of the late Lord Robert of* "*Ochiltree.*" But in regard to the Ruthven Patent, *a blank is left for the authority from which the compiler of the List professes to state the limitations of it.* The Patent was lost before this List was compiled, and it is manifest that the compiler had merely guessed *both at the date of the limitations of that* Patent, without having the original, or any authority whatever for stating the limitations as being in favor of heirs male.

The learned author describes this List as a "Manuscript of Note," and as an "authority, if *authentic*, which there seems no reason to doubt, which is "again decisive." If the List had been contemporary with the creation, or if it had mentioned the source from which the limitations are stated, it would have been entitled to some credit. But as the List was compiled *exactly a Century* subsequent to the Creation, and as it shows that it was not compiled from any authority whatever, it is obvious that it cannot be entitled to any consideration.

The List can be tested by contemporary evidence in one important particular—*the date of the Creation*—and as to this it is contradicted by the Records of Parliament. On 13th and 28th March, 1651, nearly three months after the alleged creation on 3rd January, the "Laird of Freeland" is ranked in Parliament, when the King himself was present. The Creation must have been subsequent to these rankings, although the List states it as having taken place three months before.

Acts of Parliament, vol. vi, p. 580 and p. 593. Balfour's *Annals*, vol. iv, p. 259 and p. 275.

In addition to his own arguments, the learned author quotes a Note by Lord Hailes, to the effect that the pension in favour of Lady Anne Stewart, who was the second wife of James third Lord Ruthven, was granted to her simply as Lady Anne Ruthven, and not under the designation of a Baroness. In answer to this, however, it is only necessary to notice that Miss Nisbet, who was the first wife of that Lord, was acknowledged by the Crown, in the Charter in favour of the late Lord, in 1792, as "Janet Lady Ruthven," while the second wife, in the same Charter, is only styled "Lady Anne Stewart, wife of James "Lord Ruthven." This is in accordance with a common practice in Scotland of married ladies retaining their maiden names. But no argument can be derived from that fact hostile to the right of her husband to the Dignity, for he is specially styled Lord Ruthven in that Charter, and his first wife as Janet Lady Ruthven. The remark by Lord Hailes shows a want of consistency on his part, inasmuch as he derived his celebrity as a Peerage authority by vindicating, in his well known *Sutherland* Case, the right of *female succession* in Peerages under the common law of Scotland.

The evidence and arguments of the learned author are far from being conclusive, as he complacently considers them. They were brought forward unadvisedly, and although he avows that his object was a "simple discharge "of duty" in "correcting flagrant error," those who know the circumstances of his professional misunderstanding with the late Lord Ruthven, in reference to the Annandale Peerage, have attributed that part of the learned author's publication to less pure motives than those by which he claims to have been actuated.

He says that "if there be any misconception or inaccuracy in the above "statement, or additional fact of a favourable nature that has escaped him, the "author will be at all times most happy, while he frankly acknowledges his "error, to make the necessary alteration, and to retract his inferences, in so "far as they may thereby be affected."

Subsequent to the publication of that work, the learned author continued his studies of the Peerage Law of Scotland, and published a larger work on the subject, in which no mention is made of the Ruthven Peerage, from which it may be inferred that he had abandoned his original opinion. In the later work a large portion of it is devoted to prove that Scotch Peerages always descend to females as well as males at common law. That work contains the severest animadversions on Lords Mansfield and Rosslyn for establishing the general presumption in favour of male heirs. Many of the author's remarks on the solemn decisions of these distinguished Judges are certainly carried beyond the bounds of legal literature. All the arguments in the original work of the learned author, regarding the Ruthven Peerage, form an exception to, and are directly against his general doctrine of female succession, which is urged with unusual earnestness in his more matured work.

V. Presumptions of Law in favor of Heirs Female.

From the state and possession of the Dignity of Lord Ruthven, as detailed under the immediately preceding head, it will be seen that it has been uninterruptedly enjoyed, since the original Creation in 1651, down to the present time, embracing a period of two hundred years. In the course of the long Descent of the Title, it was twice assumed and held by female heirs, and is now enjoyed by the lineal Descendant of one of those Ladies.

The learned author, who has suggested doubts of the validity of the title, attributes this protracted possession to "flagrant error." But his arguments, which have been considered, do not establish such a sweeping charge.

Another and a juster explanation, and one more in harmony with the long unbroken Descent of the Title through female heirs, will be found in the state and possession of the title, as before explained, as well as the law which has been established in similar cases, and to which reference may now be made :—

In the *Cassillis Case*, decided by the House of Lords in 1762, which involved a competition for the Earldom of Cassillis, between the heir male and the heir female, there was no Patent showing the limitations. Lord Mansfield said, "The first question is, How we shall discover a rule of Descent, where "there is no evidence of an actual creation, no Letters Patent, no investiture or "introduction into Parliament, and no Charter of Erection? I am of opinion "that the descent must be determined by *a legal presumption*."

Reports of Peerage Cases, p. 44.

And again, in alluding to the Return of the Lords of Session in 1740, Lord Mansfield says, "That there is not any maxims established in the Law of Scot-"land that can be applied universally to determine the Descent of Peerages, when "the original constitution, or new grant upon resignation, do not appear,"—and after mentioning the decision of the Lovat Case, his Lordship says that "this "shows that the descent of the title of honour was founded *only* on "presumption."

In the same Cassillis Case, Lord Hardwicke said : "The first question is, "What was the original nature and constitution of the Peerage, and to what "heirs they ought to descend where no Patent appears? If no limitation "appears, then for supplying thereof some method must be followed for dis-"covering the heirs entitled to succeed. If the Instrument of Limitation is "lost, the Court will raise a presumption on the most probable grounds. The "loss of the Instrument won't prevent the Court from proceeding on those "grounds." * * * "If the Instrument of Limitation is lost, some pre-"sumption must be found to regulate the Descent, and I think that presump-"tion ought to arise from the *nature of the fee*."

In the *Sutherland Case*, decided in 1771, Lord Mansfield said: "I take it "to be settled, and well settled, that where no Instrument of Creation or "Limitation of the honours appears, the presumption of law is in favour of the "heir male, *always open to be contradicted by the heir female*, upon evidence "shown to the contrary."

His Lordship then showed that the Claim of the heir female was an exception to the general presumption. He says that the ancestor of the heir male "wrote a book—a history of the family, which ends in 1630—and expressly "mentions the ancient Peerage as descending to Elizabeth. *It having been "accordingly enjoyed for two hundred and fifty years, no judicature would "allow a proof to affect a right so established.*"

In the *Glencairn Case*, decided in 1797, Lord Chancellor Loughborough said: "It has been fixed by repeated determinations of this House, that where "the Limitation of a Peerage is not to be discovered, the presumption is that "it descends to the heirs male of the body of the original Grantee. In the "Case of the Peerage of Lovat, where there was a competition between the "heir general and the heir male, it was determined by the Court of Session in "favor of the latter, and on the ground of that opinion Lord Lovat was tried "as a Peer. The judgment of this House in the case of the Peerage of Cassillis, "was penned expressly to mark the opinion of their Lordships, that the pre-"sumption of law was against the heir general in favor of the heir male. The "judgment in that case was followed in several other instances by this House, "down to the Cases of Sutherland and Spynie. In the case of the Peerage of "Sutherland, the heir general obtained the title by a judgment of your Lord-"ships; yet the reason was, because in the middle of the Sixteenth Century "the title had been taken up and enjoyed by the heir general, and transmitted "to her descendants,—so the ground of the decision there was that the general "*presumption of law was done away by the facts in that particular case.*"

Such is the law which has been established in cases where Patents have been lost, and this law would be held to govern the present Case. The only peculiarity in this case is, that the first heir female, who took the title, was not the heir-at-law or heir general of the last heir male. The two eldest sisters of Lord David predeceased him, and he was survived by his only sister Jean, who was the youngest. The eldest sister Anne left a son, who, if the succession had been left to the ordinary legal course, would have taken the title. Jean, however, was preferred both to the Estates and to the Title by special provision and nomination executed in her favour by the last heir male, in virtue of a power to that effect contained in the Patent, as fully explained in the third head. It has been shown, by reference to contemporary Patents, that such a power was frequently bestowed in Peerage Patents at the very time of the creation of the Ruthven Barony. The Lords of Session in their Report also set forth this practice "as usual." The Ruthven Patent was granted soon after 9th January, 1651, the date of the Patent of the Earldom of Balcarres. That Patent is preserved, and its limitations are on record. The dignity is granted to the Patentee, "*ejusque heredibus masculis tallie et provisionis, in ejus "infeofamentis expressis seu exprimendis.*"

A similar clause in the Ruthven Patent, coupled with Lord David's nomination, would warrant the inheritance of the dignity by Lady Jean, and all the subsequent heirs.

In the event of the Case being brought before the House of Lords, at any future period, by any person who might be so misled by the specious objections of the learned author before alluded to, as to adopt them, it is thought that this would be the view taken of the Case by that tribunal, as being, to use the words of Lord Hardwicke, in the Cassillis Case, " the most probable ground " of explanation of the descent of the title.

Lord Mansfield held the long possession of 250 years as conclusive in favour of the heir general in the Sutherland Case. With such evidence his Lordship appears to have held that it was incumbent upon an opposing claimant to establish that the dignity was limited to heirs male, " for," he said, " there " might have been a limitation of the honours to heirs male, but no colour of " evidence has been shown of such limitation."

Such was the force of long possession in that Case,—and equal weight would doubtless be attached by the House of Lords to the long and uninterrupted possession in the present Case.

(Signed) WM. FRASER.

HERALDRY TODAY
Heraldry Genealogy and Topography
10 BEAUCHAMP PLACE, LONDON SW3